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STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE OAKLAND COUNTY CIRCUIT COURT

STEVEN ILIADES and JANE ILIADES,

Plaintiffs-Appellees,

v.

DIEFFENBACHER NORTH AMERICA, INC,

Defendant-Appellant.

SCt No. 154358
COA No. 324726
LC No. 12-129407-NP

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# SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT DIEFFENBACHER NORTH AMERICA, INC. SUBMITTED PURSUANT TO SUPREME COURT ORDER DATED APRIL 17, 2017

Submitted by:

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## SUPPLEMENTAL ARGUMENT:

## AS A MATTER OF LAW, THE DEFENDANT MANUFACTURER IS ENTITLED TO INVOKE THE ABSOLUTE DEFENSE SET FORTH IN *MCL §600.2947(2)* BECAUSE, AS A MATTER OF UNDISPUTED FACT, THE CONDUCT LEADING TO PLAINTIFF'S INJURIES CONSTITUTED PRODUCT MISUSE, AS DEFINED IN *MCL §600.2945(e)* AND THIS MISUSE WAS NOT REASONABLY FORESEEABLE TO THE DEFENDANT

### A. Introduction.

This product liability action arises out of injuries sustained by Plaintiff Steven Iliades on June 10, 2011, during the course of his employment with Flexible Products, while operating a 500 ton vertical rubber injection molding machine more commonly referred to as a press. The press was manufactured by Defendant Dieffenbacher North American, Inc. ("Dieffenbacher") and originally installed in 1994.

On April 17, 2017, the Court issued an order directing the parties to submit supplemental briefs addressing whether, for the purpose of certain 1995 amendments to Michigan's Product Liability Statute, found at *MCL §600.2945(e)* and *MCL §600.2947(2)* and effective 3/28/96, Iliades' conduct, prior to being injured, constituted product misuse that was reasonably foreseeable.

*MCL §600.2945(e)* states:

> (e) 'Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

*MCL §600.2947(2)* states:

> (2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

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The arguments on behalf of Dieffenbacher in its supplemental brief necessitate application of principles of statutory construction. In *SBC Health Midwest, Inc v City of Kentwood, ____ Mich ___; ___NW2d ___; 2017 Mich LEXIS 734 (No 151524, 5/1/17),* this Court most recently reaffirmed the following basic principles of statutory construction:

- the primary goal of statutory construction is to ascertain and effectuate the Legislature's intent and policy choices. *Id at *5, 6*;
- Michigan courts are obliged to consider the plain meaning of every critical statutory term, phrase and clause as well as their placement and purpose within the overall statutory scheme. *Id at *5;*
- every statutory phrase, clause, and word is to be given full effect and no word or provision may be rendered surplusage or nugatory. *Id at *5;*
- unambiguous statutory language serves as the most reliable evidence of legislative intent. *Id at *6*; and,
- Michigan courts may not read or import requirements into a statute where none appear in the plain language utilized by the Legislature. *Id at *7-8.*

See also: *AG v Bd of State Canvassers, 500 Mich 907, 907-909, 915-916; 887 NW2d 786 (12/9/16)* (concurring opinion of Zahra and Viviano, J.J. and dissenting opinion of Bernstein, J.) [recognizing the same basic principles of statutory construction as well as the rule that scrupulous judicial deference is accorded to statutory amendments which, by their very nature, manifest a legislative intent to effect change].

**Accordingly, the specific issues addressed in this Supplemental Brief are:**

- whether Iliades' conduct prior to his injury constituted "product misuse" as the Michigan Legislature intended this concept be applied by the Michigan courts in the context of civil litigation; and, if so,

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- whether Iliades' product misuse was "reasonably foreseeable" to manufacturer Dieffenbacher, as the Legislature intended these terms be defined and applied by the Michigan courts.

**Neither issue presents a question for the trier of fact; rather, *MCL §600.2947(2)* requires both issues to be resolved as a matter of law. If the Court concludes that, as a matter of law, Iliades' conduct constitutes product misuse which was not reasonably foreseeable to Dieffenbacher, then Plaintiffs'' product liability claims necessarily fail under the absolute legal defense provided manufacturers by the Legislature. *Id.***

Dieffenbacher submits that, when the clear statutory language set forth in *MCL §600.2945(e)* and *MCL §600.2947(2)* is applied to the undisputed facts in the record, the necessary conclusion is that Iliades' conduct constitutes product misuse which was not reasonably foreseeable to Dieffenbacher.

**B. Iliades' conduct prior to being injured constitutes product misuse as defined in *MCL §600.2945(e)* because he deliberately disobeyed instructions and training when electing to climb into the press to reach parts located in a area not protected by the light curtain without first placing the press into manual operation.**

For the purposes of the absolute product misuse defense set forth in *MCL §600.2947(2)*, the Michigan Legislature has defined "product misuse" as "use of a product in a materially different manner than the product's intended use". *MCL §600.2945(e).* The Legislature further expanded upon this definition, explicitly stating that "product misuse" includes conduct contrary to the training, warnings and/or instructions provided to the product user as well as objectively imprudent or unreasonable uses. *Id.*

In this case, it is undisputed that Iliades' injuries occurred after he partially climbed into the press to reach finished parts in an area outside that targeted by a light curtain safety device

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without first placing the press into manual operation (Iliades' Dep, Ex 1[1], pp 54-56; Green Dep, Ex 11, pp 14-17, 20-21, 26-28; Richter Dep, Ex 12, pp 34-35; Richter Reports dated 6/11/11 (L100) and 6/17/11 (L92), Ex 13 ; Barnett Dep, Ex 15, pp 49-55; Barnett Report, Ex 16).

It is also undisputed that the light curtain on the Dieffenbacher press at issue: (1) was intended to interrupt press operations in the event that an operator inadvertently reached into the front opening while the press was operating (Whiteside Dep, Ex 3, pp 14-15); and, (2) functioned, as intended, on the date of Iliades' injuries (Michalak Dep, Ex 6, pp 93-94).

Moreover, it is undisputed that Dieffenbacher never intended that:

- press operators would partially climb through the front access and into an operating area while the press was running in automatic;
- press operators would engage in any activity other than removing finished parts through the front access opening and, only then, after the press had stopped following an automatic cycle;
- the light curtain would offer protection to an operator who deliberately climbed part-way into the press during an automatic cycle;
- press operators would even contemplate retrieval of wayward finished parts without first placing the press in manual mode;
- the light curtains would serve as an emergency stop switch; and/or,
- press operators would rely upon the light curtain as an emergency stop switch under any circumstances.

[1] All designated exhibits refer to those attached to the Defendant's Application for Leave.

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(Dzierzawshi Dep, Ex 2, p 61; Whiteside Dep, Ex 3, pp 7-9, 13-19; Brumaru Aff, Ex 5, ¶¶2-4; Michalak Dep, Ex 6, pp 48, 51, 113-115; Brumaru Dep, Ex 7, pp 24, 44; Mejia Dep, Ex 9, pp 12-13, 23; Green Dep, Ex 11, pp 14-17, 20-21).

**Significantly, the record created in this case - including admissions by Steven Iliades and his expert witnesses – conclusively establishes that Iliades' conduct was in complete derogation of explicit safety instructions and training provided by his sophisticated user-employer (Iliades' Dep, Ex 1, p 108; Dzierzawshi Dep, Ex 2, p 108; Whiteside Dep, Ex 3, pp 7-9, 13-19; Michalak Dep, Ex 6, pp 48, 113-115; Brumaru Dep, Ex 7, p 24; Mejia Dep, Ex 9, pp 12-13, 23; Green Dep, Ex 11, pp 14-17, 20-21, 26-28; Richter Dep, Ex 12, p 31; Richter Dep Exs, Ex 13; Barnett Dep, Ex 15, pp 49-55; Barnett Dep Exs, Ex 16).**

**And, both the record and basic common sense produce the inevitable conclusion that no prudent or objectively reasonable operator would intentionally climb into an industrial strength press to reach parts located outside of the operation area targeted by a light curtain without first placing the press into manual operation (Brumaru Aff, Ex 5, ¶4).**

The bottom line: Iliades' conduct prior to being injured undeniably constitutes product misuse as defined in *MCL §600.2945(e).*

**C. Iliades' product misuse was not reasonably foreseeable to Dieffenbacher.**

When enacting the absolute "product misuse" legal defense set forth in *MCL §600.2947(2),* the Michigan Legislature did not provide a definition for the terms "reasonably foreseeable". However, the words "reasonably foreseeable" are legal terms of art that, at the time *§2947(2)* was enacted, enjoyed a definite and well-settled meaning under product liability common law. Specifically, the Michigan courts had consistently held that a product misuse was not reasonably foreseeable where:

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- the particular form of misuse was contrary to or inconsistent with the manufacturer's intended use of the product;
- the particular form of misuse was uncommon; and,
- the manufacturer was unaware that the particular product misuse was a common practice.

See, i.e., *Portelli v I.R. Construction Products Co, Inc, 218 Mich App 591, 596-603; 554 NW2d 591 (1996); Bazinau v Mac Is Carriage Tours, 233 Mich App 743, 757-759; 593 NW2d 219 (1999); Davis v Link, Inc, 195 Mich App 70, 72-73; 489 NW2d (1992)*; *Mach v GM Corp, 112 Mich App 158, 163; 315 NW2d 561 (1982)*; *Wells v Coulter Sales, 105 Mich App 107, 117; 305 NW2d 411 (1981).*[2]

Under a definite and well-settled rule of statutory construction, the Michigan Legislature is presumed to have adopted the common law definition of "reasonably foreseeable" when enacting *MCL §600.2947(2). MCL §8.3a; People v Barrera, ___ Mich ___; 892 NW2d 789; 2017 Mich LEXIS 491, *4 (No 151282, dec'd 4/4/17); People v March, 499 Mich 389, 398; 886 NW2d 396 (2016); Velez v Tuma, 492 Mich 1, 13; 821 NW2d 432 (2012).* This presumption is especially strong where a contrary definition or construction of the legal terms of art would require the conclusion that the Legislature intended to abrogate the common law. *Hodge v State Farm Mut Auto Ins Co, 499 Mich 211, 218-219; 884 NW2d 238 (2016); In Re Bradley Estate, 494 Mich 367,*

[2] With the majority opinion below as the sole exception, the Michigan Court of Appeals continued, post-enactment of *§2947(2)*, to apply the established common law definition of the legal terms "reasonably foreseeable" in the context of product misuse. See, i.e., *Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning, 2012 Mich App LEXIS 2140 (No 300524, 10/25/12), lv den, 493 Mich 954; 828 NW2d 368 (2013)* [Ex 32 to Defendant's Application for Leave]*; Walton v Miller, 2011 Mich App LEXIS 1734 (No 293526, 10/4/11)* [Ex 33 to Defendant's Application for Leave]*; supra; Fjolla v Nacco Materials Handling Group, 2008 Mich App LEXIS 2432 (No 281493, 12/9/06)* [Ex 34 to Defendant's Application for Leave]*; Davis-Martinez v Brinks Guarding Servs, 2005 Mich App LEXIS 2824 (No 261941, 11/15/05)* [Ex 35 to Defendant's Application for Leave] .

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*377; 835 NW2d 545 (2013); People v Moreno, 491 Mich 38, 46; 814 NW2d 624 (2012); Wold Architects & Eng'rs v Strat, 474 Mich 223, 233-234; 713 NW2d 750 (2006).*

**Again, the undisputed product misuse in this case featured an industrial press operator partially climbing through the front access and into the operational area while the press was still running in automatic mode. The record also irrefutably demonstrates that this particular form of product misuse was not reasonably foreseeable as this legal term of art has been defined and applied under Michigan's common product liability law.**

**First,** as has been discussed, the record definitively establishes that Iliades' misuse of the press was entirely inconsistent with the product's intended use. Certainly, Plaintiffs have produced no evidence to the contrary.

**Second,** Plaintiffs proffered no evidence that it was common practice for operators to climb through the front access and into the operational area while the press was still running in automatic mode. Rather, the record confirms that Iliades' particular misuse went beyond uncommon having entirely unique in the experience of Iliades' sophisticated user employer, manufacturer Dieffenbacher and even both parties' expert witnesses (Brumaru Aff, Ex 5; Michalak Dep, Ex 6, pp 103-104; Barnett Dep, Ex 15, p 87; Def's Ans to Plts' First Set of Interrogatories, Ex 19, Answer No. 15; Def's Answers to Expert Witness Interrogatories, Ex 20, Answers 4-5).

**Third,** Plaintiffs produced no evidence that Dieffenbacher was aware that it was common for press operators to climb through the front access and into the operational area while the press was still running in automatic mode for any reason. Instead, the uncontroverted evidence is that Dieffenbacher had **no** such actual knowledge or notice (Brumaru Aff, Ex 5; Michalak Dep, Ex 6, pp 103-104; Barnett Dep, Ex 15, p 87; Def's Answer to Plt's Interrogatory #15, Ex 19; Def's Answers to Expert Witness Interrogatories #4 & #5, Ex 20; 9/17/14 Mt Trans, pp 14-17).

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Specifically, Plaintiff's own expert admitted to being unaware of any injuries involving a rubber injection molding machine with a light curtain which occurred as a result of an operator deliberately climbing part way into the machine (Barnett Dep, Ex 15, p 87). An expert retained by Dieffenbacher's similarly attested to the being aware of any report of injuries arising out of the same or substantially similar circumstances (Defendant's Answers to Expert Witness Interrogatories, Ex 14, pp 4-5). The plant manager of Flexible Products, Iliades' employer, testified that, in his 27 years of experience, he has never witnessed nor received report of a press operator climbing inside a Dieffenbacher during normal operations in order to retrieve a part (Michalak Dep, Ex 6, pp 103-104). Moreover, in the eleven year period between 1997, and Iliades' 2011 accident, there were more than 15 million machine cycles at Flexible Products without a single report of injuries in association with the light curtain operation (Dzierzawski Deposition, Ex 2, p 61; Michalak Dep, Ex 6, pp 45, 51, 67, 111).

**In short, based upon the record created by the parties before the Circuit Court, the Supreme Court should readily conclude that Iliades' misuse of the industrial press was not reasonably foreseeable to manufacturer Dieffenbacher for the purposes of application of the absolute defense contained in *MCL §600.2947(2)*.**

**Dieffenbacher respectfully submits that, when reaching this conclusion, the Supreme Court should categorically repudiate the contrary result reached and analysis utilized in the majority opinion of the Court of Appeals.**

For example, the panel majority clearly erred by refusing to suppose that the Legislature intended the existing civil common law definition of reasonably foreseeable product misuse be employed when applying *§2947(2). MCL §8.3a; Barrera, supra; March, supra; Velez, supra*. Curiously, the majority seized upon criminal case law which distinguishes between ordinary and gross negligence with ordinary negligence deemed reasonably foreseeable while gross negligence

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is not. Maj. Slip Op., pp 3-4. Had the Legislature intended to abrogate established civil product liability case law precedent in favor of the approach utilized in criminal cases, the Legislature could and should have done so through explicit statutory language. *Hodge, supra; In Re Bradley Estate, supra; Moreno, supra; Wold Arch's & Eng'rs, supra*.

Notably, while the Legislature did include an express definition of gross negligence in *MCL §600.2945(d),* no reference is made to gross negligence in *MCL §600.2947* – the portion of Michigan's Product Liability Statute devoted to limitations upon the tort liability of manufacturers and sellers, including the prohibition of liability in situations where product misuse is not reasonably foreseeable found in *§2947(2)*. Indeed, the **only** other statutory reference to gross negligence appears in *MCL §600.2946a(3)* which sets forth certain exceptions to a statutory cap on noneconomic damages set forth in *MCL §600.2946a(1)*[3]:

> The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence.

*MCL §600.2946a(3),* emphasis supplied.

Hence, had the Michigan Legislature intended that gross negligence on the part of a product user impact the application of the product misuse defense, the Legislature could have easily done so and should have explicitly done so when amending the Product Liability Statute. *SBC Health Midwest, Inc, supra; Bd of State Canvassers, supra.*

[3] "**(1)** In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00. On the effective date of the amendatory act that added this section, the state treasurer shall adjust the limitations set forth in this subsection so that the limitations are equal to the limitations provided in section 1483. After that date, the state treasurer shall adjust the limitations set forth in this subsection at the end of each calendar year so that they continue to be equal to the limitations provided in section 1483."

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Likewise, the Supreme Court should also definitively reject the majority's deduction that, for the purposes of negating the product misuse defense set forth in *§2947(2)*, evidence of "some" common form of product misuse compels the inference that "some" risk of injury is generally foreseeable. See Maj. Slip Op., p 3. At the outset, case law precedent absolutely forecloses the imposition of essentially strict liability upon manufacturers for every conceivable risk of injury. *Glittenberg v Doughboy Recreational Ind, 441 Mich 379, 387-389; 481 NW2d 208 (1992); Prentis v Yale Mfg Co, 421 Mich 670, 683; 365 NW2d 176 (1984); Owens v Allis Chalmers Corp, 414 Mich 413, 432; 326 NW2d 372 (1982).* See also: *Trotter v Hamill Mfg Co, 143 Mich App 593, 602-603; 372 NW2d 622 (1985).* And, as has been discussed, the common law test that must be presumed to have been adopted by the Michigan Legislature in *§2947(2)* focuses exclusively upon whether particular misuses and injuries are reasonably foreseeable. *Portelli, supra; Bazinau, supra; Davis, supra; Wells, supra*.

Similarly, the Court should denounce any rule that precludes judicial application of the absolute product misuse defense whenever there is evidence that an injured plaintiff's misuse was "reasonable" from the standpoint of the product user. According to the majority below, Dieffenbacher was not entitled to invoke *§2947(2)* because questions of fact exist regarding whether Plaintiff Iliades reasonably relied upon the light curtains as an "exclusive safety devices" which would/should have prevented his injuries "so long as some part of his body was sticking out of the press opening". Maj. Slip Op. pp 4-5.

Yet, had the Michigan Legislature intended to abrogate the common law and adopt a product misuse defense to rest upon the reasonableness of the product user's expectations and assumptions, the Legislature could and should have expressly adopted such a test. *Hodge, supra; In Re Bradley Estate, supra; Moreno, supra; Wold Arch's & Eng'rs, supra*. Not only is no such intent expressed in the statute or its history, allowing a factual analysis of the reasonableness of

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conduct from the standpoint of the injured party to control application of the product misuse defense would inappropriately nullify the Legislature's clear intention that the defense be one of law and be absolute after application of an objective test focused **exclusively** upon the actions and knowledge of **manufacturer**. *SBC Health Midwest, Inc, supra.* Here it is again essential to emphasize that the undisputed evidence in this case is that manufacturer Dieffenbacher had absolutely no knowledge or notice of any injuries occurring as a result of a press operator intentionally disregarding safety instructions and training by deliberately climbing part way into an operational press.

Additionally, the Court should renounce the majority's determination that, "[a]s a general proposition, manufacturers cannot reasonably expect that all instructions [warnings, training and other safety communications] will always be followed." Maj. Slip Op., p 4. Rather amazingly, the majority offered no factual basis or legal authority for a purportedly universal supposition. More to the point, the majority's assumption improperly negates the Legislature's patently obvious intention to permit an absolute product misuse defense to rest squarely upon the failure of a product user to follow instructions, warnings, training and other safety communications. *§§2945(e); 2947(2); SBC Health Midwest, Inc, supra*.

Moreover, the record in this case does not support a conclusion that it was common practice for Flexible Product press operators to rely upon the light curtains as sole safety devices. Maj. Slip Op. p 4. In reaching this conclusion, the appellate panel majority simply failed to appreciate the distinction between a temporary pause in the machine's automatic cycle and the complete shutdown off the press. The actual evidence:

- all of the Dieffenbacher molding machines are designed to normally operate in automatic mode (Mejia Dep, Ex 9, pp 12-13);

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- the light curtains are designed to temporarily interrupt press operations before the end of an automatic cycle in the event that an operator's hand/arm inadvertently breaks the beam of light directed at the front opening (Whiteside Dep**,** Ex 3**,** pp 14-15);
- all Flexible Products press operators are specifically instructed and trained regarding the general purpose and function of the light curtain and the serious dangers associated with **any** human entry into the operating area while a press was in automatic mode (Mejia Dep, Ex 9, p 24);
- all Flexible Products press operators are explicitly instructed that the light curtains are **not** and should **not** be relied upon as an emergency stop switch (Mejia Dep, Ex 9, p 24);
- all Flexible Products press operators are specifically trained to never reach inside the operating area when a press is running in automatic mode because such unsafe actions could result in serious injury (Mejia Dep, Ex 9, pp 12-13);
- with respect to instances where finished products pop off or fall from the press platens, operators are instructed and trained to manually stop the press and then retrieve the wayward parts via a rear access door (Michalak Dep, Ex 6, pp 48, 113-115); and,
- three manual emergency stop buttons are located on the main and the remote control panels of presses (Mejia Dep, Ex 9, p 23).

The Court of Appeals majority also incorrectly relied upon a perceived absence of evidence that Steven Iliades knew or should have known that the light curtain on Press No. 25 would be cleared if he climbed between the light curtain and the press. Maj. Slip Op. p 4. The **concrete** and **unrebutted** evidence in this regard:

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- Iliades was specifically instructed and trained regarding the general purpose and function of the light curtain and the serious dangers associated with any human entry into the operating area while a press was in automatic mode;
- Iliades was explicitly instructed that the light curtains were **not** and should **not** be relied upon as an **emergency stop switch**;

- Iliades knew the light curtain was a safety device designed to protect operators standing at the front of a molding machine; and,
- Iliades knew that, unless the machine was **manually** stopped, the press would **automatically** re-engage once there was no longer a foreign object within the press front opening area targeted by the light curtain.

(Iliades Dep, Ex 2, p 108; Mejia Dep, Ex 7, p 24; Whiteside Dep, Ex 3, pp 7-9, 13-19)

Continuing, the Supreme Court should disavow the majority's judgment that manufacturer Dieffenbacher should have foreseen that operators would attempt to bypass the light curtain by any number of means - including partially climbing into the industrial press while in automatic mode - precisely because Dieffenbacher had designed and installed the light curtains in response to attempts by operators to by-pass safety doors. Maj. Slip Op., pp 4-5. Under the majority's circular reasoning, the absolute product misuse defense adopted by the Michigan Legislature would never be available in cases where product misuse involved a safety device. We return to a common refrain: had the Michigan Legislature intended to exempt misuse of product safety devices from the absolute defense set forth in *§2947(2)*, the Legislature could and should have done so.

Finally, the Court must reject the majority's determination that knowledge regarding the commonality of a particular type of product misuse may be imputed to a manufacturer. According to the majority below:

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- Dieffenbacher should know how employees of its biggest customers, such as Flexible Products, actually use Dieffenbacher's presses; and,
- there was "clear testimony" from a fellow operator at Flexible Products that the light curtain on the press being operated by Iliades at the time of his injury, "did not work properly".

Maj. Slip Op. pp 4-5.

The actual evidence from Iliades' co-worker, James Preston:

- on a single occasion, Preston had been able to stand entirely outside the press but inside the light curtain, thus preventing the light curtain from stopping the press;
- he, alone, was capable of engaging in such admittedly unsafe product misuse without injury due to an extremely slender physical stature; and,
- he did not report the unusual occurrence to a Flexible Products supervisor.

(Preston Dep, Ex 23, pp 44-47).

Indeed, and ironically, the majority acknowledged that it was undisputed that, as far as Iliades' employer and Dieffenbacher were concerned, the light curtain on Press No. 25 had never failed. Maj. Slip Op. p 4. More to the point, and again, the undisputed and dispositive evidence is that neither Iliades' employer nor Dieffenbacher had actual knowledge that it was common practice for press operators to rely upon the light curtains as sole safety devices and attempt to bypass the safety device while the press was still operating in automatic mode.

**In short, the Court of Appeals majority clearly erred by refusing to affirm the Circuit Court's determination that, as a matter of law, the particular form of product misuse in which Plaintiff Iliades engaged was not reasonably foreseeable to the Defendant Dieffenbacher.**

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**Moreover, if the majority opinion is not reviewed and reversed, then the absolute product misuse defense conferred by the Michigan Legislature upon product manufacturers is effectively eviscerated. Such an unjust result should be especially disturbing in cases such as this, where the product misuse involved a safety device intended to – and which had actually provided – protection to those individuals who utilized the product as trained and instructed.**

**D. Conclusion.**

Based upon the record created by the parties before the Circuit Court, the Supreme Court should readily conclude that, as a matter of law, Dieffenbacher is entitled to invoke - and obtain summary disposition premised upon - the absolute defense set forth by the Michigan Legislature in *MCL §600.2947(2)* because:

- Iliades' conduct leading to injuries involving an industrial press manufactured by Dieffenbacher constitutes product misuse as defined in *MCL §600.2945(e)*; and,
- the particular product misuse in which Iliades engaged was not reasonably foreseeable to Dieffenbacher.

Therefore, for the reasons set forth in this Supplemental Brief, as well as those contained within Dieffenbacher's Application for Leave and its Reply Brief, the Defendant-Appellant respectfully requests the Supreme Court to reverse and vacate the Court of Appeals' majority opinion dated July 19, 2016 either peremptorily or following the grant of leave and further briefing and arguments on the merits.

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